The principal disadvantage of an approach based solely on competitive system rates is that there is unlikely to be a sufficiently large and diverse group of such systems, at least for the next several years, to make it feasible for this data base alone to provide appropriate rates for all systems. In addition, to ensure that the underlying benchmark data reflects competitive rates, it should be limited to rates in communities where there is head-to-head competition for services comparable to basic and expanded basic tiers. Such competition is rare, and tends to be short-lived. Indeed, in some cases where there is ostensible competition, there is not competition in fact, because one operator is selling to another; or because the operator has some small areas subject to competition and others that are not, and chooses to charges the same (and higher) prices for both areas to avoid discrimination problems.

One way to increase the amount of data for "effective competition" areas is to include areas where the franchising authority offers video programming to at least 50 percent of the households in that franchise area, regardless of whether actual competition exists. There appear to be 60 or more jurisdictions where this is the case. However, a municipal system could price based on costs and a return to cover its investment, or be setting its rates so they are comparable to rates charged by private systems. Hence, the data may be most useful as a check on other data. Nonetheless, the Coalition suggests that the FCC include these jurisdictions in its data collection efforts with respect to effective competition areas. The FCC should collect and analyze cost data as well as rate data for these jurisdictions.

The FCC has already initiated a survey to obtain data for areas facing effective competition. We believe the information provides at least some insight into where competitive cable rates should be, in the near term, when analyzed carefully in conjunction with other data. In the longer term, this data may provide a useful tool for evaluating results derived from the normative cost model.

2. Past regulated rates

As it has been applied by the industry in the past -- devising 1986 prices per channel and then applying that rate to 1992 systems with very high capacity -- there are significant problems with this approach. First, it is not correct to assume that merely because most franchising bodies may have had legal authority to regulate basic rates through 1986, they exercised that authority. In fact, only a small minority of local jurisdictions regulated cable rates, and thus 1986 rates probably include a monopoly component. In addition, a 1986 per-channel average cannot simply be applied to 1992 systems. Among other things, the FCC would have to develop a formula that recognizes that per-channel costs should drop, because the marginal cost of adding more channels to a system is likely to be quite low.

3. Average rates of cable systems

This alternative cannot result in reasonable rates. As the FCC noted, benchmarks based on average rates of cable systems would not reflect competition but would instead incorporate the monopoly profits included in existing rates. Thus, the use of current average rates is directly at odds with Congress' directive to "ensure that consumer interests are protected" from noncompetitive cable practices. CPCA § 2(b)(4), 106 Stat. at 1463.

In particular, the approach as presented by the FCC not only offers no protection against monopoly rates, but it gives effect to the very abuses Congress explicitly sought to prevent.[40] Cable operators around the country have quickly retiered services and taken rate hikes in anticipation of rate

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[40] Congress recognized that the cable industry has undue market power in relation to subscribers, and it sought to prevent abuse of that power. CPCA § 2(a)(2), (b)(4) & (b)(5), 106 Stat. at 1460 & 1463. In the past, the industry has abused its position by imposing unjustified rate increases and providing poor service. H.R. No. 628, 102d Cong. 1st Sess 29-30. The amount collected by cable operators through such monopoly abuses is estimated at $6 billion a year. Hearings, supra note 5, 710.

regulation in April.[41] The Commission should hardly reward such behavior by locking in monopoly rates.[42]

In Montgomery County, for example, the basic rate charged to customers who take both basic and expanded basic tiers[43] was increased 44 percent after the 1992 Act was passed, from $6.95 to $10.00 a month. Perhaps even more remarkable, rates for the same service were not increased for the handful of existing basic-only subscribers.[44] This discrepancy in rates makes clear that the huge increase is not based on economic

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[41] A survey conducted by Paul Kagan Associates, Inc. of 16 cable companies found that 14 of the companies had already raised rates, and the other two companies planned to do so by April. Prices for the highest level of basic service increased between 3.3 and 11.8 percent. Few of the companies increased programming services. Marketing News Media, Jan 18, 1993. Rates in certain communities have increased substantially more since the Act was passed. For example, rates for one basic service tier offered in Montgomery County, Maryland increased by 44 percent, 14 times the rate of inflation. Paul Farhi, Rates for Cable TV Rise in Advance of Limit Law, The Washington Post (Dec. 7, 1992), at A18-19. Prior to this last increase, rates in Montgomery County had already risen 173 percent since 1986 for the top basic service with seven fewer channels than in 1986. Paul Farhi, Regulating Cable: A Potential Response to a Wired Nation, The Washington Post (Jan. 22, 1992) at A1, A14.

[42] Letter from Sens. Hollings, Inouye, Gorton and Danforth and Reps. Markey and Dingell to FCC Chairman Alfred Sikes, December 9, 1992 (hereafter "Letter to Chairman Sikes") Att. 4. That letter was sent to "underscore that the FCC's enforcement of the law must protect consumers against unreasonable rates." The Congressmen urged the FCC "to pay particular attention to those cable operators who rush through rate increases in anticipation of rate regulation."

[43] We use the term "expanded basic" with caution here, because customers of the cable system have told the County that when they request basic service, they are provided with expanded basic and never advised of the existence of a lower tier.

[44] See notice to subscribers, Att. 5.

considerations. Rather, it is a way to (1) anticipate and avoid the impact of rate regulation, and (2) ensure that no expanded basic subscribers reduce service to become basic-only subscribers.[45] Under the FCC's proposed average rate method, benchmarks would be set <u>even higher</u> than rates existing at the time Congress determined that significant reductions were necessary.

4. <u>Cost-of-service benchmark</u>

This approach comes closest to the one the Coalition recommends. The problem with all benchmarks based on price is that it becomes much easier for the operator, over time to increase profits to monopoly levels by reducing costs. A method that allows the FCC to check industry costs periodically may help solve the problem. In addition, a cost-based model should respond to changes in costs -- upwards and downwards -- as the industry grows. If more money is spent on programming, that would be reflected in industry cost data.

The Coalition therefore recommends that the FCC adopt a variation of its proposed cost-of-service benchmark approach. Under the Coalition's method, the Commission would collect industry data, and develop cost norms where possible. Some costs -- like system replacement costs -- would be developed at the

[45] Only 4,000 out of 162,000 cable subscribers in Montgomery County take only the lowest tier of service priced at $6.95. Obviously, there won't be a big rush to sign up at a rate of $10.00 per month.

local level by multiplying industry norms for cost per mile times the number of miles of the system. The model would then generate maximum rates for each franchise area for basic and non-basic tiers.

5. Price caps

As the FCC recognizes, the price cap approach would not be a an appropriate method for setting initial rates, but might provide a method for limiting future rate changes. It would therefore be used in tandem with one or more of the other approaches. We caution, however, that it may be as likely that cable rates should be reduced as that prices should increase. At least for purposes of setting interim rates, the Coalition sees no need to provide for any automatic cost escalator.

6. Direct costs of signals plus nominal contribution to joint and common costs

This alternative appears to meet Congress' desire to ensure that basic service rates are no greater than rates that would exist in a competitive cable community, because the FCC apparently intends that this method would cover direct costs, but could recover less than the fully allocated costs of the basic tier. The nominal cost method, or some method like it, appears mandated by the provision of the statute that requires basic rates to parallel rates charge by competitive systems. However, it is not obvious that there is a simple formula that could be used to properly determine nominal costs; nominal costs are likely to depend on the local services offered. Therefore, the

Coalition believes localities must have the opportunity to adjust basic rates so they more closely reflect competitive costs.

7. Cost of service

While it is clear that some communities would not be able to apply a traditional cost of service method to establish rates, many communities, including smaller communities, could do so. For this reason, and because the cost-of-service approach can produce fair rates, the Coalition believes that a franchising authority should have the option of using a cost-of-service approach in regulating rates. Moreover, where the franchising authority exercises this option, the operator must be required to provide the franchising authority the information necessary to make such a showing. However, the FCC should not regulate cost-of-service ratemaking.

There is also no reason to give the operator the option of activating a cost-of-service proceeding it feels the benchmark rate is too low. This opens the door to allowing large operators to harass smaller cities by threatening to initiate expensive rate proceedings. Therefore, the operator should only be allowed to seek a cost-of-service proceeding where it is constitutionally required or where the operator submits actual cost data showing, at a minimum, (1) its overall rate of return was unreasonably low, and (2) the basic rate does not in fact cover nominal costs. Of course, if the operator raises cost-of-service issues, the franchising authority would have to be able to examine costs and revenues.

8. <u>Coalition Proposal</u>

The Coalition recommends these procedures for setting rates:

a. <u>An interim method</u>

For the short term, a reasonable rate can be derived by developing an estimate of the monopoly component in rates, and eliminating it. The Coalition compared price data, cost data and data indicating the amount of monopoly profits in rates, and derived an estimated cost-per-channel of $0.32 for basic and expanded basic service. The analysis is supported by an estimate of the monopoly component in rates by Smith & Katz, Att. 1, Appendix B.

b. <u>A long-term method based on cost norms</u>

The Coalition has commissioned a study of possible methods for regulating cable rates, and for the long term proposes a model that would reflect the actual costs of providing cable service, but that would be relatively easy for individual communities (or the FCC) to apply. This model could be used to evaluate both basic and non-basic rates subject to regulation.

Under the proposed model, the FCC would collect from cable operators data regarding their costs of providing cable service. The FCC would use this data to determine cost norms or averages. There might be a single, national average, or several averages, delineated by factors most critical in affecting costs of providing service. The particular factors would be determined by the FCC after it collected and evaluated cost information from operators. For example, the geographic region or the total number of subscribers served by an MSO might be key determinants in calculating costs of providing service. In addition, the FCC would have to establish an appropriate rate of return, which would then be factored into the model.

Cost data could be updated and norms revised as needed. The data collection would not be any more burdensome than the collection efforts already proposed by the FCC; the difference is that the FCC's current proposal does not ask operators to provide cost information, whereas the Coalition's model would require the FCC to collect cost data.

The model relies on the cost norms established by the FCC, but incorporates a handful of factual, easily obtainable statistics specific to an individual community's cable system. For instance, the number of subscribers on each tier of service, the number of channels on each tier, the number of homes passed, and the number of plant miles on the cable system in the franchise area would be plugged into a set formula to allocate system costs and to determine the appropriate rate, or range of rates for each service tier. The specific, proposed methods of allocating costs of service to a particular service are described in detail in Att. 1.

The model proposed by the Coalition requires the FCC to adopt a uniform system of accounts, such as a simpler version of the one required by telephone companies. This information will provide additional assurance that the cost data collected are accurate.

c. <u>Ratemaking by Agreement</u>

Cable companies, franchising authorities, and subscribers ought to be able to end rate disputes, or prevent them altogether, by entering into rate agreements. In the City of Gillette, for example, TCI and the City were able to avoid a lengthy trial by entering into rate and franchise agreements that (1) resulted in a $500,000 cash refund to subscribers, distributed in lump sum checks; (2) set the rate that could be charged for a package of services while the system is being rebuilt, and the initial rate post-rebuild; (3) set an escalator factor; and (4) provided that the Company agreed to charge no more in Gillette than in its other systems. While both sides might complain that some aspects of the settlement are not to their liking, Gillette, TCI and consumers have benefitted from it. The Commission ought to make clear that such agreements are enforceable and are consistent with well-established regulatory principles.[46] Also consistent with the principles, the rate agreement would be reviewed and altered by the FCC if the FCC determines that the contract no longer serves the public

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[46] <u>Federal Power Comm'n v. Sierra Pacific Power Co.</u>, 350 U.S. 348 (1956); <u>United Gas Pipeline Co. v. Mobile Gas Service Corp.</u>, 350 U.S. 332 (1956). An agreement <u>not</u> to regulate, however, is not enforceable under these same principles.

interest, because, for example, rates were much too high or much too low.

In addition, franchising authorities would have the option of using actual rather than average costs in regulating rates. The operator would be required to provide this cost-of-service information to the franchising authority. A uniform system of accounts will be an invaluable asset where a franchising authority chooses to use a cost-of-service regulatory method.

Two of the methods described above derive rates for particular systems based on group data. The Supreme Court has held that the Constitution does not prohibit rate regulation based on average or group norms. The Court said in In Re Permian Basin Area Cases, 390 U.S. 747, 769 (1968):

> This Court repeatedly recognized that legislative and administrative agencies may calculate rates for a regulated class without first evaluating the separate financial position of each member of the class. . . .

Accord Bowles v. Willingham, 321 U.S. 503 (1944). The Supreme Court held in Bowles that, where rates are set based on group norms, there need not be allowance for a cost-of-service appeal before the rates go into effect. Id. at 519.[47]

Under the Coalition's approach, actual or average costs would be used to determine whether particular rates for basic and

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[47] The Supreme Court in Permian Basin explicitly left open whether the Constitution requires that, where maximum rates are established on a group or averaged basis, a regulated entity must have the opportunity to withdraw from the regulated activity or to seek special relief from the group rates. Permian Basin, 390 U.S. at 770.

non-basic rates are justified. At most, where average costs were used to set a rate, an operator would be permitted in a particular instance to show that the rate should be increased. To make such a showing, the operator would have to demonstrate that the average rate did not cover nominal costs of providing the service, and that the rate was confiscatory with respect to its services overall.

The Coalition's approach is consistent with Congress's intent that the regulator look at cost recovery for cable services overall, and its determination that costs allocated to the basic tier might be less than the amount that would be allocated on a per-channel basis. Conf. Report (Report No. 102-862) at 63.[48] The cost-of-service appeal standard is also in accord with the well-established principle that a regulated entity is not constitutionally guaranteed a profit, nor is it entitled to a particular rate of return. Federal Power Com'n v. Natural Gas Pipeline Co, 315 U.S. 575, 590 (1942); Jersey Central Power & Light Co. v. FERC, 810 F. 2d 1168, 1181 (D.C. Cir. 1987); Central Arkansas Auction Sale, Inc. v. Bergland, 570 F.2d 724, 729 (8th Cir. 1978). The party that seeks to show that a rate order results in unjust and unreasonable consequences bears a heavy burden. Federal Power Comm'n v. Hope Natural Gas , 320 U.S. at 602.

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[48] See also H.R. Rep. No. 628, 102d Cong., 1st Sess. 83 (1992) (regulated tiers cannot serve as the base to allow for marginal pricing of unregulated services; revenues from other services can be included to determine whether the operator will get a "reasonable profit").

The regulatory approach recommended by the Coalition reduces the instances in which lengthy and burdensome cost-of-service appeals are likely to occur, and protects subscribers by not permitting operators to pass through to subscribers unreasonable costs or imprudent investments made in reliance on monopoly power.

D. Regulation of Rates for Equipment

Summary of Coalition Position

The FCC tentatively concludes that charges for equipment and installation should be separate, and that such charges should be limited to actual costs. The FCC asks for suggestions on how best to achieve a competitive market for installation services and equipment. The FCC asks how regulation of equipment used to receive non-basic service should be treated, and whether those rates should also be limited to actual costs. The FCC proposes to allow rates for basic equipment to include direct and indirect costs, including a reasonable profit. It seeks advice on how best to determine and allocate equipment costs. The FCC proposes to determine costs for installation on the same basis as for equipment. The FCC asks if the Act intended to prohibit operators from charging less than cost for installation.

Equipment must be priced and sold (or leased) separately. Equipment charges imposed on basic-only subscribers should be limited to costs actually attributable to providing basic service and should not include costs of blocking out non-basic services. To encourage competition for sale or lease of equipment, operators must be prohibited from interfering with the rental or purchase of equipment from another supplier. Charges for installation must be separate from charges for equipment. Only actual costs of installation may be recovered, and such costs should be presumed to be nominal where wiring already exists in the subscriber's home. Likewise, charges for additional outlets should be limited to actual costs, namely, costs of any equipment necessary to activate additional outlets, and actual installation costs, if any.

Discussion

The Coalition agrees with the FCC's tentative conclusions that Congress intended to separate rates for equipment and installations from other basic rates. The Coalition also agrees that rates for equipment and installation must be based on actual costs, and costs for installation will vary depending on whether the dwelling is already wired to receive cable.[49] In addition, rates for installation should not be bundled with rates for lease of equipment. Recovery for sales of equipment over time should be limited to actual costs, as the FCC suggests.

The Coalition urges the FCC to recognize that rates for leasing equipment should be unbundled from each other. Unbundling means that equipment is priced and sold separately. Moreover, basic-only subscribers should only be charged for equipment actually necessary to provide basic service. Basic subscribers should not bear the costs of equipment which the

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[49] H.R. Rep. No. 628, 102d Cong., 1st Sess. 83 (1992).

operator requires a basic subscriber to use, but which is in fact related to the provision of enhanced service, or which blocks out reception of non-basic services

Operators may not in any way interfere with a customer's purchase of equipment from another supplier, or prevent a subscriber from deciding first to buy from the operator and then later deciding to buy from another supplier. Such interference prevents competition and impedes development of new products.

Where wiring already exists in the home, installation costs should be presumed to be nominal. Where the wiring has to be installed, an operator should be limited to actual, provable costs of installation.

E. Costs of Franchise Requirements

Summary of Coalition Position

The FCC believes that the purpose of requiring it to create standards to identify costs attributable to satisfying franchise requirements is to allow the operator to identify such costs on subscribers' bills. The FCC does not believe that such costs must be treated as separate from charges for basic service. The FCC tentatively concludes that such costs should include any direct costs of providing services required by the franchise, per-channel costs for the number of channels used to satisfy PEG requirements, and reasonable allocation of overhead.

Costs of franchise requirements should be limited to direct costs. The burden should be on the operator to verify those costs. Unless the operator is managing PEG access facilities, it incurs no overhead costs for PEG access channels, nor does it bear any significant channel costs. Channel opportunity costs should not be deemed a cost of satisfying franchise requirements.[50]

F. Implementation and Enforcement

Summary of Coalition Position

The FCC asks how rate regulation should occur initially once the franchising authority has been certified to regulate basic rates. The FCC suggests that the same procedural requirements should be used for subsequent rate changes. The FCC sets forth a number of possible procedural approaches. Under any of these proposals, the rate would go into effect automatically if the franchising authority had not acted within a certain, specified period of time. It asks whether certain price increases beyond the operator's control are subject to the 30-day notice requirement. Under the FCC's tentative approach, the operator would have to notify subscribers of the proposed rate increase. Formal hearings would not be necessary, but the franchising authority would issue a written explanation of its rate decision. The FCC asks for comments on how rate decisions would be enforced and appealed. The FCC also sets forth a proposal that would comply with the Act's requirement that the operator give subscribers notice of the availability of a basic service tier.

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50 *See* H.R. Rep. No. 628, 102d Cong., 1st Sess. (1992).

The coalition agrees that the Commission may prohibit operators from placing rates into effect prior to their consideration by a franchising authority, and believes the simplest way to implement the legislation is to provide for a reasonable review period, to be extended if the franchising authority finds there are additional issues for review.

A proposed increase may be rejected on the merits or if the operator fails to provide information requested by the franchising authority. The franchising authority has broad authority to regulate basic rates, including the right to set rates, the right to rollback existing rates, and the right to order refunds where appropriate.

The Commission should also make it clear that franchising authorities have the right to establish rates, and to order refunds where appropriate. A similar issue was litigated in Gillette v. TCI Cablevision of Wyoming, Inc., No. 90-CV-1046-J (Nov. 15, 1991) (decision to be vacated upon joint motion of the parties, following settlement). In that case, TCI argued that under the 1984 Cable Act, Gillette lacked authority either to establish or to order refunds of rates. The Court ruled:

> Nothing in...the Cable Act suggests that Gillette may not establish or reduce rates...Village of Schaumberg v. Cablenet, No. 86 C 1710 (N.D. Ill. 1986) (holding Village had and has authority to review reasonableness of rate increase, even after the increase is implemented)....[T]he right to establish rates is included in the right to "regulate" rates [under the Cable Act] without any explicit grant. Therefore, the Court finds that Gillette had and has authority to establish rates for any tier of

cable service that is subject to rate regulation.

Slip Op. at 21. If under the 1984 Cable Act communitites could establish rate and order refunds, they may do so now. Moreover, at least in cases where a cable operator raises rates or refuses to lower rates in contravention of an order of a franchising authority (or the Commission), the issue has little to do with refunds in a classic utility sense; rather, the operator is collecting rates illegally, and would not be entitled to retain the fruits of the illegal collection under any reading of the law. The operator has the burden of showing that a proposed rate increase is reasonable.

The requirement that operators give 30 days notice of any increase in the price of basic services applies to any increase, regardless of the reason for the increase, and in particular, regardless of whether it is due to factors beyond the operator's control. In addition, the 30-day notice period establishes a minimum requirement, and does not prevent the franchising authority from requiring longer notice periods, or requiring notice in other situations, for example, where there is an effective increase in rates because of a decrease in the service provided.

Discussion

The Coalition agrees with the FCC that an operator must notify subscribers of a proposed rate increase at approximately the same time that it notifies the franchising authority. Any interested party, including subscribers, may have an opportunity to present its views. However, as the FCC asserts, formal rate hearings are not required. The Coalition agrees that franchising authorities may require the operator to provide additional information, including proprietary information. The Coalition agrees with the proposal that enforcement of regulation should occur at the local level. The Coalition believes that franchising authorities should have discretion to impose penalties, such as fines, for violations.

The Coalition supports the FCC's suggestion that operators must give subscribers notice of the availability of basic service tiers within 90 days after FCC regulations take effect, at the time of initial installation, and in any promotional information distributed prior to installation and hookup. These notices should be in writing.

The Coalition also asks the FCC to recognize that all rate increases or rate changes are subject to the notice provision. This includes any implicit rate increases, for example, where the rate remains unchanged but the service provided for that rate is reduced. This was clearly contemplated by Congress.[51] Likewise, the operator must provide notice and demonstrate that an increase is justified, even where the increase is allegedly due to increased costs beyond the operator's control.

Once the operator gives notice of a proposed rate increase, the FCC proposes to establish a period during which the rates are suspended pending local review. As noted above, the Coalition

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[51] Senate Report at 75, 1992 U.S.C.C.A.N. at 1208.

supports this approach. There is also an alternative way to achieve similar results. After the operator gives notice, the franchising authority would have 30 days to notify the operator that the new rate must be suspended pending review and final determination or, alternatively, that the rate may go into effect at the end of the 30-day period, but subject to refund. Absent notice, the rate would be suspended. The franchising authority should then have at least 120 days (in addition to the 30-day notice period) to review the proposed rates and determine if they are reasonable. This should provide the franchising authority adequate opportunity to issue public notice of the proposed rate,[52] to review information submitted by the operator and subscribers, and to determine if the rate is reasonable. The time period takes into account the fact that many communities have substantial procedural requirements, for example, that rate decisions must be adopted by ordinance, and cannot be adopted before there have been three public readings. However, the time period is not so long that it unduly burdens the operator.

In most cases, the franchising authority would make rate decisions after hearing. To ensure subscribers receive rapid interim relief, however, after April 3, the franchising authority may simply adopt the interim benchmark and issue an order requiring many interested party to show cause why that per-

[52] Public notice and other specific procedures are required by law in many communities. In addition, the Act requires franchising authorities to establish regulation that will allow consideration of the views of interested parties, and adequate time for this must be allocated. § 623(a)(3)(C), 106 Stat. at 1464.

channel rate should not go into effect. This procedure is necessary to give subscribers some relief from monopoly rates without delay.

The FCC should make clear that the franchising authority may, if it denies a rate increase, set a rate for basic service. The franchising authority also has the power to order refunds. Moreover, the proposed requirement that a franchising authority give a written explanation of its rate decision may be satisfied by any written statement, such as an ordinance or an explanation included in the hearing transcript.

The FCC may impose forfeitures on cable operators that do not comply with franchising authorities' rate decisions that are consistent with FCC rate regulations. The forfeitures should be used to provide rate relief to the injured subscribers. But relief should not be limited to forfeitures; to obtain renewal, operators must comply with "applicable law," 47 U.S.C. § 543(c) and failure to do so should give rise to potential non-renewal or revocation.

4. Regulation of Cable Programming Services

A. Regulations Governing Rates

Summary of Coalition Position

The FCC asks how it should balance the factors Congress directed it to consider in determining whether non-basic programming service rates are unreasonable. The FCC inquires whether the same approach may be used for basic and non-basic rate regulation, and tentatively concludes that the advantages and disadvantages of each method it proposed for basic regulation are equally applicable to non-basic.

As explained previously, monopoly profits are inherently unreasonable and should not be retained by the operator. Rate for non-basic services can be established by using the same method proposed for establishing basic rates. This approach gives effect to the intent of the Act's rate regulation provisions, by eliminating excess profits and limiting operators to a reasonable rate of return.

Congress recognized that non-basic programming (other than per-channel or per-program offerings) are in many franchise areas not presently subject to open or competitive markets, and are not priced as low as if there were an open and competitive market.[53] With basic and non-basic service rates alike, the Act seeks through regulation to eliminate non-competitive pricing and marketing strategies, and to instead offer cable subscribers options that would exist in a competitive market. By basing its regulatory model on costs, whether actual or generalized, the Coalitions's proposal over the long term comes closer than the proposed benchmark methods (with relative ease of application) to arriving at competitive rates.

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[53] Senate Report at 10-12, 75, 1992 U.S.C.C.A.N. at 1142-43, 1208.

B. Complaint Procedures; Rate Reduction and Refund Procedures for Rates Found to be Unreasonable

Summary of Coalition's Position

The FCC sets forth proposals regarding how complaint procedures for non-basic rates should be initiated and asks for suggestions on the best approach. The FCC also asks whether there should be a different pleading standard for franchising authorities or parties represented by counsel.

The FCC proposes to require a complainant to serve a copy of the complaint on the operator and or the franchising authority. The operator would respond, and the FCC would determine whether the complaint warranted further review. The FCC sets forth several possible procedures involving review of the challenged rate. The FCC tentatively proposes to require a complaint to be filed 30 days after notice of a rate change. The FCC asks what relief would be appropriate if the rate was ultimately determined to be unreasonable.

The FCC should establish a formula for determining the average per-channel rate that an operator may charge. A complaint alleging either that the per-channel rate for non-basic service or that the amount for basic and non-basic service combined exceeds this amount on a per-channel basis would be sufficient to make the necessary minimal showing that non-basic rates are unreasonable. This is consistent with the Act's requirement that the FCC consider rates as a whole in determining whether a non-basic rate is unreasonable. CPCA § 623(c)(2)(D), 106 Stat. at 1469.

The FCC should establish a form that can be filled out to satisfy the minimum pleading requirements necessary to obtain FCC review of a non-basic rate. There should, in any event, be a minimal burden placed on the complainant, and complainants should have at least 120 days to file complaints after receiving notice of a proposed increase. The FCC should not impose a more stringent burden for complaints filed by franchising authorities or persons represented by counsel.

Discussion

The Coalition agrees with the FCC's tentative conclusion that the cable operator has the burden of refuting a complaint that has satisfied the minimum necessary showing that a non-basic service rate is unreasonable.

The FCC is correct in proposing that, when an operator objects to providing information it regards as proprietary, the operator has the burden of demonstrating that a significant competitive injury might result from disclosure, and that, in such a case, as much disclosure as possible will nevertheless be required. But, from experience, the Coalition knows that cable operators too often claim that the very data essential to reviewing their performance is confidential. That cannot be permitted here under a system where the public and the franchising authority must have full access to data to evaluate rates.

The Coalition supports the FCC's proposal that it may reduce rates and order refunds. However, the Coalition believes "refunds" should take the form of cash rebates to subscribers, rather than prospective percentage reductions in rates to account for past overcharges from the date of the complaint. The latter limits relief to those who continue to subscribe during the refund period and results in forced loans from subscribers to the operator. In Gillette, Wyoming, refunds were successful (and popular) made in one lump sum payment.

The Coalition disagrees with the FCC's suggestion that a subscriber must file a complaint within 30 days of receiving notice of a rate change. A subscriber should have 120 days to file such a complaint.[54] Cable companies often try to disguise rate increases, for example, by restructuring tiers or by breaking out charges previously lumped together. In Montgomery County, Maryland, the cable operator implemented a $2.00 a month increase in the "full service" rate at the same time it began giving subscribers a $2.00 pro rata refund of their converter deposit. Thus, the total amount paid by many subscribers did not change immediately as a result of the increase, and would not be reflected in overall monthly charges for twelve months.[55] It might take even the most astute subscriber more than 30 days to recognize that the change actually is an increase or to recognize the full extent of the increase. In addition, after discovering the rate increase, the subscriber will likely need time (1) to

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[54] Some companies bill subscribers at staggered intervals. The 90 days should not begin to run until notice is sent to a particular complainant.

[55] A sample of the rate announcement is included as Att. 5.